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CPLR 3108 and 3109: Availability of Written Questions Where Non-Party Witness Cannot Be Served with Subpoena Within State

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logically follows is whether the language of CPLR 3111, a mere disclosure device, can sanction the production of an item otherwise conditionally protected from disclosure by CPLR 3101. It would seem that if an item is held to be "material prepared for litigation," the conditions of 3101(d) must be met before *any* disclosure may be had. The court in no way indicated whether or not such conditions had been satisfied. It merely stated that 3111 allowed production of the report. This statement does not appear to be consonant with the language of 3101(d).

CPLR 3108 and 3109: Availability of written questions where non-party witness cannot be served with subpoena within state.

In *Gorie v. Gorie*,[102] defendant sought disclosure, through written questions in California, of plaintiff's former husband (who was apparently not amenable to process in New York) with respect to their understanding on separation and the validity of their Mexican divorce. To this, plaintiff asserted various objections. The court discussed the applicable CPLR provisions[103] governing written questions, and held that when a non-party witness is not subject to the in personam jurisdiction of the courts, he may be examined without the state regardless of his residence or domicile.

CPLR 3108 provides for the taking of a deposition upon written questions "when the testimony is to be taken without the state." However, that provision proceeds upon the assumption that there exists a valid basis for the taking of testimony outside New York. Thus, the question of the validity of out-of-state depositions must necessarily precede the question of the availability or at least the effectiveness of the 3108 device. Clearly, the language of the court has reference to a situation where the witness sought to be examined may not be compelled by our courts to consent to an examination. Thus, the efficacy of the court's holding must depend upon out-of-state sanction pursuant to a provision similar to CPLR 3102(e).[104] Fortunately, California, the state where the witness was to be examined, has just such a statute.[105]

CPLR 3109, as the court indicated, outlines the procedure to be followed when CPLR 3108 is employed. Various time limits are specified within which the questions must be served. CPLR 3115(e) provides that objections to the form of written questions

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[102] 48 Misc. 2d 411, 265 N.Y.S.2d 19 (Sup. Ct. N.Y. County 1965).

[103] The two main provisions are CPLR 3108 and 3109.

[104] CPLR 3102(e) enables our courts to compel a witness in a foreign proceeding to appear and testify where such would be proper according to the law of the jurisdiction wherein the foreign proceeding is pending. This provision represents New York's adoption of the Uniform Foreign Depositions Act. 7B MCKINNEY'S CPLR 3102, commentary 139 (1963).

[105] CAL. CODE CIV. PROC. § 2023.

are waived if not served within certain time periods (all terminating before trial). There is no analogous provision with respect to substantive objections. They need not be made before trial. Thus, the practitioner should cautiously analyze his objections; while he may consider a certain objection substantive in nature, he may find himself precluded from raising it at the trial because the court has ruled that it relates only to form. To be completely safe, *all* objections to questions—both written and oral—should be objected to in the manner prescribed by CPLR 3115(e). Furthermore, if the objection is unquestionably substantive, there is definite authority for raising it in a motion for a protective order pursuant to CPLR 3103(a).

CPLR 3121: Apparent conflict between Rules of the Appellate Division, Second Department and CPLR 3121.

Under CPLR 3121, a party may be compelled to submit to a physical, mental or blood examination when it is an issue in the action. In *Fiore v. Bay Ridge Sanitarium, Inc.*,[106] defendants moved, in a malpractice suit, to compel plaintiff to undergo a physical examination and to comply with other demands relating to such examination. Plaintiff opposed the motion on the ground that the special rules of the appellate division, second department, expressly except physical examinations and the exchange of medical information in malpractice actions.[107] Thus, an apparent conflict existed between CPLR 3121 and the court rules.

In holding that CPLR 3121 takes precedence over the rules, the court relied upon CPLR 101 which expressly states that the CPLR governs in civil judicial proceedings in all courts except where the procedure is regulated by inconsistent statute. The court reasoned that this construction, in conjunction with the policy behind CPLR 3121 which indicates a trend toward allowing disclosure under all circumstances, justified the granting of defendant's motion.

The court, in its decision, did not consider the possibility that the court rules govern only the *procedure* by which a party seeks medical information and merely except medical and dental malpractice from the purview of these procedural provisions. Thus, while the procedure by which one might obtain medical information in malpractice actions cannot be discovered by an examination of the court rules, these rules do not appear to exclude or prohibit the exchange of such information. Since the CPLR supplements the rules in the cases of doctors and dentists, the parties must refer to the CPLR for the disclosure and exchange of medical information in malpractice suits.

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[106] 48 Misc. 2d 318, 264 N.Y.S.2d 421 (Sup. Ct. Kings County 1965).
[107] Rules of N.Y. App. Div. pt. 4 (2d Dep't 1963).